

Supreme Court, U. S.
FILED
JUL 6 1977
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976.

No. **77-42** 14

~~FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,~~

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

WILLIAM H. TOWLE,
*Attorney for Petitioners, American
Warehousemen's Association and
The International Association of
Refrigerated Warehouses, Inc.*

BURKE, KERWIN & TOWLE,
180 North LaSalle Street,
Chicago, Illinois 60601,
(312) 332-5106,
Of Counsel.

TABLE OF CONTENTS.

	PAGE
Opinions Below.....	3
Jurisdiction	3
Questions Presented for Review.....	4
Constitutional Provisions and Statutes Involved.....	4
Statement of the Case.....	5
Reasons for Granting the Writ:	
I. The Instant Decision of the Court of Appeals Con- flicts with That of the United States Court of Appeals for the Ninth Circuit.....	7
II. The Constitutionality of the Warehouseman's Lien Provisions Has Important Consequences and Should Be Resolved.....	8
Conclusion	11
Appendix:	
A Full Appendix Is Attached to the Petition for a Writ of Certiorari Filed by Petitioners Flagg Brothers, Inc. and Henry Flagg. Reference Will Be Made to That Appendix if Required. Attached Hereto as Appendix A Is the Full Text of New York Uniform Commercial Code Section 7-210.....	A1

TABLE OF CITATIONS.

Cases Cited.

Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc., No. 76-1722 (8th Cir., argued Feb. 6, 1977).....	7
Fuentes v. Shevin, 407 U. S. 67, reh. denied, 409 U. S. 902 (1972).....	8
Melara v. Kennedy, 541 F. 2d 802 (9th Cir. Aug. 2, 1976) reh. and reh. en banc denied, No. 74-2831 (Oct. 8, 1976).....	7
Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974).....	8
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) .	8

Constitutional Provisions and Statutes Cited.

Cal. Com. Code § 7210(2).....	7
N. Y. U. C. C. § 7-210.....	7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

Petitioners, American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit. That judgment reversed an order of the District Court in

favor of petitioners dismissing, for lack of "state action", respondents' complaint challenging Sections 7-209 and 7-210 of the New York Uniform Commercial Code as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The judgment remanded the cause to the District Court for class-action determination and to determine the constitutionality of Section 7-210(2) authorizing enforcement by extrajudicial sale of a warehouseman's lien.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix attached to the Petition of Flagg Brothers, Inc. and Henry Flagg. The opinion of the District Court for the Southern District of New York is reported at 404 F. Supp. 1059 (S. D. N. Y. 1975) and is set forth in the Appendix attached to the Petition of Flagg Brothers, Inc. and Henry Flagg.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 7, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

A petition for a Writ of Certiorari is being filed by Flagg Brothers, Inc. and Henry Flagg. It is requested that the instant petition be consolidated for consideration with that of Flagg Brothers, Inc., and Henry Flagg.

QUESTIONS PRESENTED.

1. Is "state action" present in the enforcement of a warehouseman's lien for payment of storage charges as provided under New York Uniform Commercial Code Section 7-210?
2. Does the lien enforcement procedure satisfy due process when applied by a commercial warehouse against the goods of a merchant stored in the ordinary course of his business?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The relevant Constitutional provisions and statutes are attached as an Appendix to the petition of Flagg Brothers, Inc. and Henry Flagg. These are: Amendment XIV, Section 1, to the United States Constitution (in part), Section 1 of the 1871 Civil Rights Act, 42 U. S. C. § 1983, and its Federal jurisdictional counterpart, 28 U. S. C. § 1343(3). The full text of Section 7-210 of the New York Uniform Commercial Code is set forth at pages A1-A3 of the Appendix appended hereto.

STATEMENT OF THE CASE.

This case involves the constitutionality of a warehouseman's right to enforce his lien for default in payment of his charges in conformity with § 7-210 of the New York Uniform Commercial Code. This Code provision is substantially the same in 49 states and in the District of Columbia.

The household goods of the respective respondents were stored with petitioner warehouseman Flagg Brothers Inc. in separate transactions. In the course of the storage service, respondents each failed to pay their storage charges and the warehouseman threatened to sell the contents at public auction as permitted by N. Y. U. C. C. § 7-210(2). No sale took place in either case.

On September 21, 1973 respondent Brooks commenced this action as a class action in the United States District Court for New York's Southern District. Federal jurisdiction was invoked under the Civil Rights Act of 1871, 42 U. S. C. § 1983, and its jurisdictional counterpart, 28 U. S. C. § 1343(3). Respondent Jones intervened in the action, by permission of the District Court. Both respondents sought compensatory damages, permanent injunctive relief and a declaration of unconstitutionality under 28 U. S. C. §§ 2201 and 2202. The Attorney General of the State of New York and four associations of commercial warehousemen, including American Warehouseman's Association and The International Association of Refrigerated Warehouses, Inc. (hereinafter termed AWA and IARW), were allowed to intervene by the District Court as parties defendant. The propriety of the class action was never certified under Fed. R. Civ. P. 23(c), although petitioners Flagg Brothers, Inc., and Henry Flagg originally stipulated thereto. The five intervening defendants did not so stipulate at any time.

By decision and order entered July 7, 1975, the District Court denied respondents motion for summary judgment and granted petitioners' cross-motion to dismiss the complaint for lack of Federal jurisdiction and for failure to state a claim upon which relief could be granted. The District Court found that the requisite "state action" necessary to sustain a claim under 42 U. S. C. § 1983 and 28 U. S. C. § 1343(3) is absent in the case of the sale of warehoused goods pursuant to the Uniform Commercial Code. The respondents appealed.

By a 2-1 vote, the Court of Appeals for the Second Circuit reversed the District Court's dismissal. The majority found that the sale provisions were statutory in nature and were in the nature of a public function sufficient to conclude that "state action" was involved. The dissent agreed with the District Court that the enforcement of a warehouseman's lien was never a public function and that the state is not involved in a significant degree in the case of a warehouseman's lien sale.

The Court of Appeals remanded the action to the District Court for class-action determination and for further proceedings on the issue of whether the Uniform Commercial Code's statutory scheme comports with due process.

REASONS FOR GRANTING THE WRIT.

I.

THE INSTANT DECISION OF THE COURT OF APPEALS CONFLICTS WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The United States Court of Appeals for the Ninth Circuit has held, in *Melara v. Kennedy*, 541 F. 2d 802, *reh. and reh. en banc denied* (Oct. 8, 1976), that the extrajudicial sale of stored household goods to enforce a warehouseman's lien under California Commercial Code § 7210, subd. (2), identical to N. Y. U. C. C. § 7-210(2), does not constitute "state action" within the meaning of the Fourteenth Amendment and of Section 1 of the Federal Civil Rights Act of 1871, 42 U. S. C. § 1983. No appeal has been taken from that decision.

There is, thus, a direct conflict between the Second and Ninth Circuits on whether "state action" is present in a warehouseman's lien sale of stored goods.

The Second Circuit recognized the conflict between the two circuits, stating in its opinion below:

"We recognize that our holding that the enforcement of the warehouseman's lien pursuant to § 7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara v. Kennedy*, *supra*. We have given that case due consideration but we disagree with its conclusion and are unpersuaded by its analysis."

That the resolution of the conflict in the holdings of the Ninth and Second Circuits is appropriate is further evidenced by the fact that the same issues are being litigated before the Eighth Circuit in *Cox Bakeries of North Dakota, Inc. v. Timm Moving and Storage, Inc.*, No. 76-1722 (8th Circuit, argued February 16, 1977). It is time to resolve the issues in conflict.

This resolution is especially important to petitioners AWA and IARW whose members operate commercial warehouses throughout the United States. Warehouses in one circuit may enforce the lien provisions of the statute while others in another circuit may not. It is appropriate to resolve the conflict and establish a uniform rule.

II.

THE CONSTITUTIONALITY OF THE WAREHOUSEMAN'S LIEN PROVISIONS HAS IMPORTANT CONSEQUENCES AND SHOULD BE RESOLVED.

In a series of decisions the Court has faced the question of due process requirements applicable to various creditor self-help type statutes as applied to consumer transactions. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes v. Shevin*, 407 U. S. 67, *reh. denied*, 409 U. S. 902 (1972); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974).

As explained in the opinion of the Court of Appeals below there have been a series of cases in the circuit courts involving due process challenges to other lien statutes, such as the innkeepers lien and the garageman's lien.

The warehouseman's lien statute is unlike the statutes involved in these prior Supreme Court and circuit court decisions because, for the first time, the challenged statute governs the relationship between businessmen dealing at arms length, *i.e.* between commercial warehousemen and merchants storing goods in the course of their business, as well as the relationship between individual consumers storing personal household goods and the household goods warehouseman.

Merchandise or commercial warehousemen, represented here by petitioners AWA and IARW, are those who store for merchants who are manufacturing and distributing goods in the national market. Merchandise warehouses perform a vital commercial function in facilitating the movement of goods in the stream of commerce. Goods from all over the country, as well

as imported goods, are consigned to a local warehouse. The warehouse receives the goods, performs the various break bulk and other commercial services with respect to the goods, and distributes them in customized orders to the various customers of the bailor. Its function is to facilitate the flow of goods from producer to user. Distribution costs are reduced and operating efficiencies are attained.

In providing these vital commercial services the local warehouseman relies upon the existence of the warehouseman's lien. It permits him to assume the risk of receiving goods; storing the goods; performing the necessary break-bulk, packaging and related functions; and shipping the goods. Often he will pay the incoming and outgoing freight charges to facilitate the movement of the goods.

All of these services and expenditures are done in reliance upon the lien. The lien applies to all goods of the bailor in possession of the warehouseman, allowing the release of goods but retaining the security of the lien upon other goods of this bailor in storage.

The existence of the lien allows the free flow of goods through the warehouse without the necessity of prepayment procedures or similar strictures which would preclude the movement of goods until charges have been satisfied. The lien allows the local, generally small warehouseman to deal in the goods of companies located throughout the country and the world without the need for prearrangement for security, credit, prepayment and similar protections. The lien facilitates the movement of goods through the stream of commerce.

The Circuit Court recognized, in the final paragraph of its opinion, the position of the commercial warehouse. It recognized that these petitioners "... have raised a serious argument that a summary sale provision in this context (*i.e.* sale by a commercial warehouseman of a merchants goods stored in the ordinary course of business) may be constitutionally unobjectionable." The Court proceeded to draw a distinction between Section

7-210(1) allowing a private sale and Section 7-210(2) requiring a public sale.

However, Section 7-210(8) of the Uniform Commercial Code allows a warehouseman who has a lien upon goods stored by a merchant in the course of his business to enforce it in accordance with either Section 7-210(1), at private sale, or Section 7-210(2), at public sale.

Thus, the decision of the Circuit Court that Section 7-210(2) involves state action and that the constitutionality of that provision can be separately decided from Section 7-210(1) does not resolve the problem for the commercial warehouseman. This approach ignores the fact that the merchandise or commercial warehouseman relies upon both provisions of the statute. Public sale of a merchant's goods by a commercial warehouse is equally as important, if not actually more important than the right to conduct a private sale.

Consequently, it is imperative that this Court, assuming it should find that "state action" exists, address the issue of whether the enforcement of the lien against the goods of a merchant stored in the course of his business is constitutional, recognizing the nature of the parties and the type of goods involved.

CONCLUSION.

The Second Circuit decision is in direct conflict with the Ninth Circuit decision in *Melara v. Kennedy*, on the same matter. It ought to be reviewed to resolve this conflict. The Uniform Commercial Code has nationwide applicability and commercial uniformity requires a removal of the conflict.

The Supreme Court should also consider the question of the constitutionality of the warehouseman's lien enforcement provisions in so far as they relate to merchandise warehousemen.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

WILLIAM H. TOWLE,

*Attorney for Petitioners, American
Warehousemen's Association and
The International Association of
Refrigerated Warehouses, Inc.*

BURKE,, KERWIN & TOWLE,
180 North LaSalle Street,
Chicago, Illinois 60601,
(312) 332-5106,
Of Counsel.

APPENDIX A.

§ 7-210. ENFORCEMENT OF WAREHOUSEMAN'S LIEN.

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

- (a) All persons known to claim an interest in the goods must be notified.
- (b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

- (c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.
- (d) The sale must conform to the terms of the notification.
- (e) The sale must be held at the nearest suitable place to that where the goods are held or stored.
- (f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons

against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.